

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



75-7239

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**United States Court of Appeals**

**For the Second Circuit**

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THE ANDERSON COMPANY and  
ALICE SCRANTON EASTMAN ANDERSON,  
*Plaintiffs-Appellants,*  
*against*

JOHN P. CHASE, INC.,  
*Defendant-Appellee.*

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On Appeal from the United States District Court  
for the Southern District of New York

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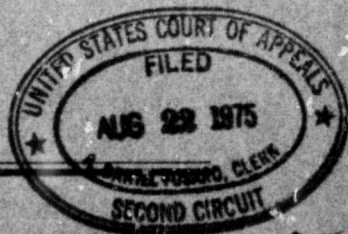
**BRIEF OF APPELLEE**

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# United States Court of Appeals

For the Second Circuit

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Docket No. 75-7239

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THE ANDERSON COMPANY and  
ALICE SCRANTON EASTMAN ANDERSON,  
*Plaintiffs-Appellants,*  
*against*

JOHN P. CHASE, INC.,  
*Defendant-Appellee.*

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On Appeal from the United States District Court  
for the Southern District of New York

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## BRIEF OF APPELLEE

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### Statement of the Issues

I. Did the district court correctly hold that appellee complied with its obligations, both statutory and contractual as bargained for by appellants, with a proper degree of care and attention?

II. Was the district court correct in excluding, as irrelevant, evidence proffered by appellants which only established sales by a mutual fund advised by appellee of one-seventh of its position in one security during a three-month period?

III. Did the district court correctly deny appellants' motion for rehearing of the trial of this action on the basis of twenty pages of deposition testimony after it considered that testimony and determined that it would not have a material bearing on the findings of fact and conclusions of law previously entered?

### Statement of the Case

Appellants, The Anderson Company ("Anderson Co."), a Massachusetts limited partnership, and Alice S. E. Anderson ("Mrs. Anderson"), sought to recover in this action trading losses which they incurred and which they claimed resulted from the investment advice provided to them by appellee, John P. Chase, Inc. ("Chase Inc."). Jurisdiction was asserted under the Investment Advisers Act of 1940, 15 U.S.C. §80b-1 *et seq.* (the "Advisers Act"). Pendent common law claims of breach of contract, breach of fiduciary duty and fraud were also asserted.

The action was tried before the Honorable Milton Pollack, sitting without a jury, on November 11, 12 and 13, 1974. After the trial, the court dismissed all counts of the complaint and judgment was entered on behalf of Chase Inc.

Appellants' brief here is little more than a recapitulation of their post-trial memorandum to the district court. Judge Pollack considered and rejected appellants' claims in his comprehensive findings of fact and conclusions of law, consisting of fifty-four pages. Appellee submits that the district court's treatment of appellants' claims is the

best rebuttal of the issues raised in appellants' brief. The Court is thus respectfully referred to the district court's findings of fact and conclusions of law found at 597a-650a,\* upon which appellee will rely in its response to this appeal.

## A R G U M E N T

I

**The district court correctly found that Chase Inc. did not violate its duty to appellants.**

From the commencement of this action, it has been patently clear to appellee that appellants' claims are entirely without merit. Appellants themselves admitted in their complaint that the losses they incurred resulted from short sales ordered in the accounts of appellants by Douglas Anderson\*\* without the advice of Chase Inc. (Complaint, ¶22), and, indeed, against Chase Inc.'s initial and continuing advice (616a).

Appellants have sought continuously to place Chase Inc., an investment adviser, in the position of appellants' insurer for the losses in their accounts resulting from Mr. Anderson's short trading. In pursuit of this goal, they cite here (AB18-AB21), as they did below, a variety of cases which contain broad language relating to "fiduciary duty" but which in all instances involve self-dealing by the adviser or fiduciary, of which the district court found "not even the

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\* References followed by "a" are to the Joint Appendix on this appeal. References preceded by "AB" are to appellants' brief.

\*\* Douglas Anderson ("Mr. Anderson") is Mrs. Anderson's son as well as her attorney-in-fact, and is the general partner of Anderson Co. Mr. Anderson managed the appellants' securities accounts.

slightest hint" in this case (620a).<sup>\*</sup> Appellants cited these cases and provided the same analysis of them, almost verbatim, to the district court, which considered them and rejected them (620a-621a). Similarly, appellants' claim that Chase Inc. failed to provide to the Anderson accounts "investment supervisory services," as that term is defined in the Advisers Act (AB16-AP17, AB33-AB50), was considered and rejected by the district court (618a-622a, 649a). Finally, appellant's contentions that the systems and procedures used by Chase Inc. were inadequate (AB2-AB13, AB24-AB50), were examined at length by the district court and found to be totally unfounded (622a-631a, 649a).

Appellants' only new twist before this Court is their claim that the district court found that they had "waived" their rights (AB50-AB55). This contention is entirely without merit. Indeed, it is incredible to suggest the term "waiver" in the context of the Anderson-Chase Inc. relationship. Nowhere in the district court's opinion is there any mention of waiver or any finding that appellants waived any of their rights under their agreement with Chase Inc. To the contrary, the district court properly concluded that at all times appellants received exactly the service they requested (622a). From the beginning, Mr. Anderson, whom the court correctly recognized as "a sophisticated investor and knowledgeable speculator" (602a) knew exactly what he wanted in terms of services from Chase Inc.: "the benefit of a flow of the information available to Chase, Inc. that he could use in managing the accounts..." (601a-602a). Furthermore, as the court found,

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<sup>\*</sup> See, e.g., *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963); *Rosenfeld v. Black*, 445 F.2d 1337 (2d Cir. 1971) cert. dismissed 409 U.S. 802 (1972); *Charles Hughes & Co. v. SEC*, 139 F.2d 434 (2d Cir. 1943), cert. den. 321 U.S. 786 (1944).

throughout the course of the relationship and without exception, Mr. Anderson insisted "that he would evaluate the advice and act on it to the extent that he chose to do so, that he would place all brokerage orders to buy and sell securities, and that Chase Inc. would not be called on to exercise any discretionary authority for the accounts" (602a). The district court found that nothing in the record supports appellants' contention that the "flow of information" from Chase Inc. sought by Anderson was ever interrupted (632a-633a, 642a).

Appellants' stock-market losses, resulting primarily from short sales, were caused entirely by Mr. Anderson's stubborn refusal to follow Chase Inc.'s advice (612a-617a, 647a, 650a). Accordingly, the district court quite properly concluded that:

"Chase, Inc. complied with its obligations, both statutory and contractual as bargained for by Anderson, with a proper degree of care and attention. Chase, Inc. provided 'investment supervisory services' based upon the individual needs of each of the accounts insofar as those needs were predetermined by Anderson and represented by him to Chase, Inc." (649a).

## II

**The district court correctly excluded irrelevant evidence proffered by appellants at trial.**

Appellants' claim that the district court improperly excluded their offer of evidence of transactions by a mutual fund advised by Chase Inc. (AB57-AB59) is entirely without merit. All that appellants' offer of proof established was that during a three-month period in 1967, a mutual

fund advised by Chase Inc. sold one-seventh of its holding of Ampex Corporation, while retaining the other six-sevenths (265a-268a). Mrs. Anderson sold one hundred and fifty shares of Ampex at some point during the same three months (266a). Clearly the district court was correct in its determination that such proffered evidence was totally irrelevant to any of the issues in this case (267a-268a). Appellee submits that this Court should uphold the district court's exercise of its discretion in excluding irrelevant evidence where, as here, such exercise was clearly correct.

### III

#### **The district court correctly denied appellants' post-trial motion for a rehearing.**

Over two months after the entry of judgment, appellants moved for a rehearing of the trial in this action, on the grounds that appellants' counsel had neglected to include a portion of a pre-trial deposition of one of appellees' witnesses in the trial record (653a-679a). A copy of the portion of the deposition in question was annexed to appellants' moving papers (658a-678a) and was considered by the court (684a). The district court denied the motion on the ground that the proffered deposition testimony "would not have a material bearing, either with respect to the Court's resolution of the credibility questions or with respect to the findings of fact and conclusions of law previously entered" (684a).

The district court's determination of lack of materiality should be sustained by this Court, as fully within the dis-

cretion of the trial court. *See, e.g., Altman v. Connally*, 456 F.2d 1114 (2d Cir. 1972); *Parker v. Broadcast Music, Inc.*, 289 F.2d 313 (2d Cir. 1961). In addition, as the district court noted, the omission was not excusable under Rule 60(b) of the Federal Rules of Civil Procedure because the deposition segments were not newly discovered evidence, and because appellants' counsel had had ample opportunity to introduce the proffered testimony at trial, when other sections of the same deposition were introduced (684a).

Appellee submits that the real purpose of appellants' counsel's motion was to bring the proffered testimony to the attention of this Court, and that has now been accomplished (658a-678a). Indeed, Chase Inc., for the sake of finality in this action, did not oppose appellants' motion to bring the deposition testimony before the district court for its consideration, because appellee believed that that testimony would have no effect whatever on the judgment below (682a). The portion of the testimony on the basis of which a rehearing is sought is now available to this Court for its consideration, as it was to the court below (658a-678a). Appellee submits that there is nothing in the twenty deposition pages that merits a reversal of the district court's order denying a rehearing.

### Conclusion

The order of the district court dismissing the complaint and granting judgment to defendant Chase Inc. should be affirmed. The order of the district court denying a rehearing should likewise be affirmed.

Dated: New York, New York  
August 22, 1975

Respectfully submitted,

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